* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **IA.No. 9680/2006(u/O 7 Rule 11 CPC) & CS(OS) 250/2006**

% **Date of decision : 08.08.2008**

PRIYANKA VIVEK BATRA .....Plaintiff
Through: Mr. Pradeep K Bakshi with
Mr Madhur Yadav, Advocates

Versus

NEERU MALIK & ORS ..... Defendants
Through: Mr. Akhil Sibal with Ms Meghna Mishra,
Mr Abhishek Roy and Mr Salim Inamdar,
Advocates.
Defendant No.3 ex parte.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

RAJIV SAHAI ENDLAW, J

1. The defendants No. 1 and 2 have filed this application under Order 7 Rule 11 CPC for rejection of the plaint as premature and not disclosing any cause of action and on the ground of claim therein being barred by the Benami Transactions (Prohibition) Act. Vide order dated 2nd May, 2007, the plaintiff was also called upon to satisfy on the territorial jurisdiction of this court to entertain the suit.

2. One Shri Ashok Malik was the father of the plaintiff and the defendant No.2 and the husband of the defendant No.1. Shri Ashok Malik died on 4th January, 2003. It is the case of the plaintiff that Shri Ashok Malik has left a Will dated 29th October, 2002 of which probate has been applied for by its executor before this court and is pending as Testamentary Case No. 3/2006. It is the case of the defendants No. 1 and 2 that the said Shri Ashok Malik left a Will dated 28th February, 1998 and they have applied for probate of the same in the courts at Chandigarh. The plaintiff has instituted the present suit (a) for declaration that the agricultural land situated at Rajasthan and Haryana and the flat at Belvedere Tower, DLF City Phase II, Gurgaon are the properties of Shri Ashok Malik and the plaintiff alone is entitled to the said properties in accordance with the Will dated 29th October, 2002; (b) for further declaration that in terms of the said Will, the defendants do not have any share in the aforesaid properties; (c) for declaration that certain other properties in Gurgaon and Rohtak, which the defendant No.1 has got transferred to her name on the basis of the Will set up by the defendant No.1, is bad and; (d) for further declaration that certain other properties again at Haryana in the joint names of Shri Ashok Malik and the defendant No.1 or in the sole name of the defendant No.1 are, in fact, the properties of Shri Ashok Malik only and in terms of the will dated 29th October, 2002 of Shri Ashok Malik the plaintiff alone is entitled to the said properties; (e) for permanent injunction restraining the defendants from dealing with the said properties.

3. The counsel for defendants No. 1 and 2 has argued that all the immovable properties with respect to which declaration is claimed are situated outside the territorial jurisdiction of this court; u/S 16(d) of the CPC the suit for determination of any right or interest in immovable property can be filed only in the court within whose jurisdiction the property is situated. It is further urged that in the present case all the parties also are outside the jurisdiction of this court. Reliance was also placed on **Harshad Chiman Lal Modi v DLF Universal Ltd** [(2005) 7 SCC 791] to canvass that the bar of territorial jurisdiction is statutory bar within the meaning of Order 7 Rule 11(d) CPC

4. The counsel for defendants No. 1 and 2 relied upon **Ram Shankar v Balakdas** AIR 1992 MP 224 to contend that the jurisdiction of civil court to adjudicate on validity of Will is barred owning to the exclusive jurisdiction of the Probate court. Reliance is further placed on **Smt Rukmani Devi & Ors v Narendra Lal Gupta** 1985 1 SCC 144; **Rukn-ul-Mulk S Abdul Wajid & Ors v Mrs Gajambal Ramalingam and Ors** AIR (37) 1950 Mysore 57 and **Alagammai & Ors v V. Rakkammal** AIR 1992 Madras 136 to urge that the judgment of the probate court would be a judgment in rem and would have binding effect as it is the probate court alone which can go into the question of the validity of the Will. It was urged that the plaintiff, till the probate of the Will on the basis of which title to properties is claimed had no legal character within the meaning of Section 34 of the Specific Relief Act and of which declaration could be claimed.

5. The defendants/applicants also urged that the reliefs that properties in the name of defendant No.1 or in the joint names of defendant No.1 and her deceased husband (father of plaintiff and defendant No.2) were the properties of deceased only is in the teeth of Section 4 of the Benami Act and it did not make any exception for a wife, as the defendant No.1 admittedly is.

6. The counsel for the plaintiff, on the other hand, relied upon **Union Bank of India v Logic Systems Pvt Ltd** (AIR 1992 Del 153) and **Rohit Kochar v Vipul Infractrure Developers Ltd** 122 (2005) DLT 480 to contend that this court has territorial jurisdiction. He further urged that the bar of Benami was not applicable between husband and wife. The counsel for the plaintiff stated that the question of whether the defendant No.1 or the deceased was the owner of the property could not be adjudicated in the probate proceedings and the plaintiff had instituted the suit to curtail delays even after succeeding in probate proceedings. During the hearing, on inquiry, counsel for the plaintiff admitted that the defendants No. 1 and 2 were in possession of the properties with respect to which declaration was claimed. Upon further inquiry as to why the plaintiff had not claimed the consequential relief of possession of the properties, the counsel for the plaintiff stated that the plaintiff has in the plaint craved leave under Order 2 Rule 2 CPC in this respect and would be claiming the said relief in the event of the probate being allowed and further in the event of it being declared that the deceased only was the owner of the properties which stand in the name of the defendant No.1 or in the joint names of deceased and defendant No.1.

7. Re: The suit being premature or the plaint disclosing no cause of action.

A. The Madhya Pradesh High Court in **Ram Shankar** has held that in a civil court no issue can be struck to decide if the Will is the last valid Will of the deceased or not. This court in **Manmohan Singh v Joginder Kaur** 2002 (64) DRJ 293 held that a suit for declaration on the basis of unregistered Will in respect of which no probate has been obtained is not maintainable.

B. On the contrary this court in **Behari Lal v Karam Chand** AIR 1968 P & H 108, **Murli Dhar Dua v Shashi Mohan** 68 (1997) DLT 284 and **Preethi Pal Singh v Jagjit Singh** 1996 (37) DRJ 643 has held that in so far as Delhi (and it equally applies to Haryana where subject properties are situated) it is not essential to obtain probate of Will and Will can be setup and proved in collateral proceedings also.

C. Moreover, the plaintiff in the present case is not seeking declaration that the Will dated 29th October, 2002 is the last validly executed Will of the deceased. The probate of said Will is pending adjudication.

D. The plaintiff, on the premise that the Will dated 29th October, 2002 is the last validly executed Will of the deceased and whereunder she is the main beneficiary, is seeking declaration of her title to the properties and negative declaration that defendants No 1 and 2 have no title thereto. If the Will dated 29th October, 2002 is not held to be the last validly executed Will of deceased, the plaintiff will not be entitled to declaration of her title to the properties; the other declaration sought by the plaintiff of defendant No.1 being benami

owner and the deceased being the real owner of the properties would also not serve any purpose then, in as much as even if that were to be so, the plaintiff would without the Will dated 29th October, 2002, not get any title thereto. So the question is, whether in such situation, does the plaint disclose any cause of action for the relief of declaration.

E. Section 34 of Specific Relief Act permits seeking of declaration of any legal character or right to any property. However, here, the right to property claimed by the plaintiff is dependent upon the Will dated 29th October, 2002 being held to be validly executed last Will of deceased and which will be held in pending probate proceedings. So the declaration sought is dependent upon the outcome of the probate proceedings. Though if probate is granted, the plaintiff would be deemed to have inherited the estate under the Will from the moment of demise (in as much as title does not remain in abeyance), but the fact remains that the plaintiff as on the date of institution of suit and even today has a mere chance or hope of having title to the property. In fact, no declaration can be made till the outcome of the probate proceedings. Even if inquiry is held whether the defendant No.1 was the benami and deceased real owner of the properties and declaration pursuant thereto made, the said declaration will be ineffectual and abortive in the event of probate of Will dated 29th October, 2002 failing.

F. As far back as in **Sheoparsan Singh v Ramanandan Prasad** AIR 1916 PC 78 it was said:

> "There is so much more danger in India than here of harassing and vexatious litigation that the courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischivious

source of litigation”

G. The institution of the present suit brings to life the fears expressed more than a century ago. I fail to see what purpose will be achieved by the plaintiff by pursuing the present suit, when the plaintiff herself being out of possession of the properties is at this stage not suing for possession and as aforesaid, wants to do the same if successful in probate (though the permission under Order 2 Rule 2 CPC sought in plaint is not for relief of possession) I am at this stage not entering into the controversy whether the suit for declaration is maintainable for the reason of plaintiff having not sued for possession, in view of the proviso to Section 34 of Specific Relief Act. The spirit of law and scheme of procedure as enshrined in Section 34 Specific Relief Act and Order 2 rule 1 CPC is that every suit as far as practicable be framed so as to afford ground for final decision. Even if the present suit is held to be maintainable, the same will not be the final decision in as much as the plaintiff will still have to sue for possession.

H. **Shipping Corporation of India Ltd v Machado Brothers** AIR 2004 SC 2093 lays down that if the litigation, irrespective of the result will benefit neither of the parties to litigation should not be flogged like a dead horse. This court in **Maha Singh v Shri Anand** 116 (2005) DLT 378 held that court is not an idle docile and mindless spectator powerless to bring frivolous litigation to an early end; the court is also not a slave of proceeding.

I. If the present suit is allowed to proceed the defendant No.1 will be compelled to prove her title and all of which may be irrelevant and waste if ultimately the Will propounded by defendant No.1

succeeds.

J. I am conscious that I have travelled beyond the scope of Order 7 Rule 11 of CPC, but I consider it essential to do substantial justice between the parties specially when the plaintiff is not likely to suffer any loss and all rights of plaintiff, if successful in her Will, are protected.

K. I accordingly hold the plaint to be not disclosing any cause of action for the reliefs of declaration claimed and/or the plaintiff at this stage being not entitled to the relief of declaration. If the plaintiff ultimately succeeds in proving Will in her favour, the plaintiff shall be entitled to claim all reliefs including those claimed in the present suit and would not be disentitled from claiming the same for the reason of having filed the present suit. The defendants having applied for rejection of plaint as premature would then also not be entitled to take the defence of the claim of plaintiff then being barred by time. The cause of action for the reliefs of declaration would accrue to plaintiff (within the meaning of Article 58 of schedule 1 of Limitation Act) only on plaintiff being found the beneficiary of the Will set up by her.

8. Re: Territorial Jurisdiction

A. The Single Judge judgment of this court in **Rohit Kochar** relied upon by the counsel for plaintiff has been reversed by Division Bench of this court in **Vipul Infrastructure Developers Ltd Vs. Rohit Kochar** 2008 IV Apex Decisions, Delhi, 63. The other judgment of this court is **Union Bank of India** also does not advance the case of the plaintiff. The relief of declaration cannot fall in the proviso to

Section 16 CPC in as much as defendant is not required to do anything. The Apex court in **Harshad Chiman Lal Modi** has held that the proviso does not apply to suits for specific performance also even where the defendant is within the jurisdiction of the court. Grant of the relief of declaration will necessarily entail determination of rights to or interest in immovable property and which the legislature has provided, can be done only by court within the local jurisdiction of which the property is situated. If declaration is granted in favour of the plaintiff, the same will necessarily entail also declaring transfer of the said properties recorded in concerned offices outside Delhi as bad and rectification thereof in those offices outside Delhi. The plaintiff has also sought relief of appointment of receiver of the properties. The receiver will also have to act outside jurisdiction of court. Thus it cannot be said that relief can be entirely obtained through personal obedience of defendants, within the meaning of proviso to section 16 CPC. A suit for declaration of rights in immovable property on the ground that defendant no.1 was benami & deceased was real owner or that certain properties having been acquired through monies of deceased are properties of deceased squarely falls in section 16(d) CPC. Support in this respect can be derived from **Anil Verman v Raheja Developers Pvt Ltd** (1999)78 DLT 295 and, **Sheela Aggarwal v Infocom Digital Systems Pvt Ltd** (1998)72 DLT 622. I, therefore, hold that this court has no territorial jurisdiction to entertain the suit as framed and the plaint is liable to be rejected on this ground.

9. Re: The claim in suit be barred by Benami Transactions Prohibition Act.

The argument of the counsel for the defendants No. 1 and 2 that the claim of the plaintiff that the properties in the name of the defendant No.1 or in the joint names of the defendant No.1 and her deceased husband are held benami and her deceased husband was the real owner thereof is barred by Benami Transactions Prohibition Act, 1988 does not appear to be tenable in view of **Nand Kishore v Sushil Mehra** AIR 1995 SC 2145 holding that neither the filing of a suit nor taking of a defence in respect of either the present or past benami transaction involving the purchase of property by a person in the name of his wife is prohibited under sub-sections (1) and (2) of Section 4 of the Benami Act. This court thereafter in (80) 1999 DLT 670 on facts held that the wife was benami and the husband was the real owner of the property. The plaint is, therefore, not liable to be rejected on this ground.

10. Re: The relief of permanent injunction claimed in the plaint

The plaintiff has, besides the relief of the declaration, with respect to which, as aforesaid, the plaint is liable to be rejected, has also claimed the relief of permanent injunction restraining the defendants from dealing with the properties with respect to which declaration is claimed. The relief of permanent injunction has been claimed as a consequential relief to the relief of declaration. Once it is held that the plaint for relief of declaration is liable to be rejected/dismissed, the plaint insofar as for the relief of permanent injunction is concerned also does not survive. Be that as it may, the

relief of permanent injunction is also barred by the provisions of Section 41(h) of the Specific Relief Act. The plaintiff has equally efficacious relief of protecting the estate of the deceased by applying to the probate court under Part VII, chapter XXIII of the Indian Succession Act, 1925. It has been held in **Cotton Corpn of India v United Industrial Bank** AIR 1983 SC 1272 that the relief of permanent injunction is barred by the provisions of Section 41 of the Specific Relief act.

11. In view of the findings aforesaid, the plaint is rejected/dismissed for the reason of not disclosing any cause of action and/or for the reason of the relief of declaration being premature and/or the plaintiff being not entitled to the same on the date of the institution of the suit and further on the ground of the relief of declaration claimed in the plaint being barred by law i.e., Section 16 of the CPC and the relief of permanent injunction claimed in the plaint being barred by the provisions of Section 41 of the Specific Relief Act. However, in the facts of the case, the parties are left to bear their own costs.

RAJIV SAHAI ENDLAW
(JUDGE)

August 08, 2008
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